

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 08, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MOHANAD ELSHIEKY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 2:20-CV-00064-SAB

**ORDER GRANTING THE
PARTIES' JOINT MOTION
FOR ENTRY OF PROTECTIVE
ORDER**

Before the Court is the parties' Joint Motion for Entry of Protective Order, ECF No. 19. The motion was heard without oral argument. The parties ask the Court to enter their proposed Protective Order. Recognizing the Court's preference that, as a general matter, parties should enter into private confidentiality agreements in lieu of a stipulated Protective Order, the parties make the following arguments as to why the Court should enter their proposed Protective Order.

First, the Privacy Act, 5 U.S.C. § 552a requires a Court Order to disclose government employment records. Second, Plaintiff is seeking the production of certain records the United States has deemed "law enforcement sensitive." The United States seeks a Court Order, rather than a private agreement, to protect these records. Finally, rather than have two separate agreements the parties ask the Court to order that all confidential material be governed by a single court order to

**ORDER GRANTING THE PARTIES' JOINT MOTION FOR ENTRY
OF PROTECTIVE ORDER ~ 1**

1 minimize administrative burdens and confusion.

2 For these reasons, good cause exists to grant the parties' Joint Motion.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. The parties' Joint Motion for Entry of Protective Order, ECF No. 19,
5 is **GRANTED**.

6 2. The Court enters the following **Protective Order**:

7 1. PURPOSES AND LIMITATIONS

8 Discovery in this action is likely to involve production of confidential,
9 proprietary, or private information for which special protection may be warranted.
10 Accordingly, the court hereby enters the following Protective Order. This Order
11 does not confer blanket protection on all disclosures or responses to discovery, the
12 protection it affords from public disclosure and use extends only to the limited
13 information or items that are entitled to confidential treatment under the
14 applicable legal principles, and it does not presumptively entitle parties to file
15 confidential information under seal.

16 2. "CONFIDENTIAL" MATERIAL

17 "Confidential" material shall include the following documents and tangible
18 things produced or otherwise exchanged:

- 19 a) personally identifying information and other non-public personal
20 information (e.g., health, financial, and employment records) of the
21 producing party or the producing party's family members or employees;
22 b) Official Personnel File ("OPF") of Derek Haynes that is restricted from
23 disclosure by the Privacy Act, 5 U.S.C. § 552a or other applicable
24 privacy disclosure protections;¹

26 ¹ Pursuant to 5 U.S.C. § 552a(11), and subject to the conditions described herein,
27 Defendant is authorized to release to Plaintiff's counsel government records and
28 information containing what Defendant asserts is Privacy Act protected personal

- 1 c) OPF of Jose Nunez that is restricted from disclosure by the Privacy Act,
2 5 U.S.C. § 552a or other applicable privacy disclosure protections;
3 d) OPF of Eugene Hagreen that is restricted from disclosure by the Privacy
4 Act, 5 U.S.C. § 552a or other applicable privacy disclosure protections;
5 e) agency records relating to law enforcement activities/operations,
6 guidelines for operations, training materials, and internal investigations
7 which (1) contain tactical information not available to the general public
8 that could be adversely used against law enforcement by non-law
9 abiding groups or individuals and/or (2) contain sensitive information
10 about the Border Patrol's staffing, priorities, resources, intelligence
11 and/or methods, in particular, that is law enforcement sensitive and
12 should not be released to the general public; and
13 f) any information that the producing party is obligated by contract or state
14 or federal law to keep confidential.

15 Notwithstanding the above, the parties reserve the right to challenge the
16 discoverability of any document that falls within the definition of "Confidential"
17 material. The parties further reserve the right to challenge the designation of
18 confidentiality of any document using the procedure described in paragraph 6.

19 3. SCOPE

20 The protections conferred by this Order cover not only confidential material
21 (as defined above), but also (1) any information copied or extracted from
22 confidential material; (2) all copies, excerpts, summaries, or compilations of
23 confidential material; and (3) any testimony, conversations, or presentations by
24

25 information of non-party individuals. Without determining the issue, Defendant
26 may disclose the subject records and information to Plaintiff's counsel without
27 obtaining prior written consent of the individuals to whom those records pertain,
28 and such disclosure will not violate the Privacy Act.

**ORDER GRANTING THE PARTIES' JOINT MOTION FOR ENTRY
OF PROTECTIVE ORDER ~ 3**

1 parties or their counsel that might reveal confidential material.

2 However, the protections conferred by this Order do not cover information
3 that is in the public domain or becomes part of the public domain through trial or
4 otherwise.

5 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

6 4.1 Basic Principles. A receiving party may use confidential material that
7 is disclosed or produced by another party or by a non-party in connection with this
8 case only for prosecuting, defending, or attempting to settle this litigation.

9 Confidential material may be disclosed only to the categories of persons and under
10 the conditions described in this Order. Confidential material must be stored and
11 maintained by a receiving party at a location and in a secure manner that ensures
12 that access is limited to the persons authorized under this Order.

13 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
14 otherwise ordered by the court or permitted in writing by the designating party, a
15 receiving party may disclose any confidential material only to:

16 (a) the receiving party’s counsel of record in this action, as well as
17 employees of counsel to whom it is reasonably necessary to disclose
18 the information for this litigation;

19 (b) the officers, directors, and employees (including in house
20 counsel) of the receiving party to whom disclosure is reasonably
21 necessary for this litigation, unless the parties agree that a particular
22 document or material produced is for Attorney’s Eyes Only and is so
23 designated;

24 (c) experts and consultants to whom disclosure is reasonably
25 necessary for this litigation and who have signed the
26 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

27 (d) the court, court personnel, and court reporters and their staff;

28 (e) copy or imaging services retained by counsel to assist in the

1 duplication of confidential material, provided that counsel for the
2 party retaining the copy or imaging service instructs the service not to
3 disclose any confidential material to third parties and to immediately
4 return all originals and copies of any confidential material;

5 (f) during their depositions, witnesses in the action to whom
6 disclosure is reasonably necessary and who have signed the
7 “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless
8 otherwise agreed by the designating party or ordered by the court.

9 Pages of transcribed deposition testimony or exhibits to depositions
10 that reveal confidential material must be separately bound by the
11 court reporter and may not be disclosed to anyone except as
12 permitted under this Order;

13 (g) the author or recipient of a document containing the information
14 or a custodian or other person who otherwise possessed or knew the
15 information.

16 4.3 Filing Confidential Material. Before filing confidential material or
17 discussing or referencing such material in court filings, the filing party shall
18 confer with the designating party to determine whether the designating party will
19 remove the confidential designation, whether the document can be redacted, or
20 whether a motion to seal or stipulation and proposed order is warranted. During
21 the meet and confer process, the designating party must identify the basis for
22 sealing the specific confidential information at issue, and the filing party shall
23 include this basis in its motion to seal, along with any objection to sealing the
24 information at issue. The motion to seal will be filed in accordance with Local
25 Civil Rule 7. The Court will review the motion and determine whether the party
26 who seeks to maintain the confidentiality of its information has satisfied the
27 requirements to seal. The burden of proving the confidentiality of designated
28 information remains with the designating party, even if it is not the party filing the

1 motion to seal. Failure to satisfy this requirement will result in the motion to seal
 2 being denied, in accordance with the strong presumption of public access to the
 3 Court's files.

4 5. DESIGNATING PROTECTED MATERIAL

5 5.1 Exercise of Restraint and Care in Designating Material for
 6 Protection. Each party or non-party that designates information or items for
 7 protection under this Order must take care to limit any such designation to specific
 8 material that qualifies under the appropriate standards. The designating party must
 9 designate for protection only those parts of material, documents, items, or oral or
 10 written communications that qualify, so that other portions of the material,
 11 documents, items, or communications for which protection is not warranted are
 12 not swept unjustifiably within the ambit of this Order. Mass, indiscriminate, or
 13 routinized designations are prohibited. Designations that are shown to be clearly
 14 unjustified or that have been made for an improper purpose (*e.g.*, to unnecessarily
 15 encumber or delay the case development process or to impose unnecessary
 16 expenses and burdens on other parties) expose the designating party to sanctions.
 17 If it comes to a designating party's attention that information or items that it
 18 designated for protection do not qualify for protection, the designating party must
 19 promptly notify all other parties that it is withdrawing the mistaken designation.

20 5.2 Manner and Timing of Designations. Except as otherwise provided in
 21 this Order (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise
 22 stipulated or ordered, disclosure or discovery material that qualifies for protection
 23 under this Order must be clearly so designated before or when the material is
 24 disclosed or produced.

25 (a) Information in documentary form: (*e.g.*, paper or electronic
 26 documents and deposition exhibits, but excluding transcripts of
 27 depositions or other pretrial or trial proceedings), the designating
 28 party must affix the word "CONFIDENTIAL" to each page that

contains confidential material. If only a portion or portions of the material on a page qualifies for protection, the producing party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

(b) Testimony given in deposition or in other pretrial proceedings: the parties and any participating non-parties must identify on the record, during the deposition or other pretrial proceeding, all protected testimony, without prejudice to their right to so designate other testimony after reviewing the transcript. Any party or non-party may, within fifteen days after receiving the transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or exhibits thereto, as confidential. If a party or non-party desires to protect confidential information at trial, the issue should be addressed during the pre-trial conference.

(c) Other tangible items: the producing party must affix in a prominent place on the exterior of the container or containers in which the information or item is stored the word “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection, the producing party, to the extent practicable, shall identify the protected portion(s).

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the designating party’s right to secure protection under this Order for such material. Upon timely correction of a designation, the receiving party must make reasonable efforts to ensure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

1 6.1 Timing of Challenges. Any party or non-party may challenge a
2 designation of confidentiality at any time. Unless a prompt challenge to a
3 designating party's confidentiality designation is necessary to avoid foreseeable,
4 substantial unfairness, unnecessary economic burdens, or a significant disruption
5 or delay of the litigation, a party does not waive its right to challenge a
6 confidentiality designation by electing not to mount a challenge promptly after the
7 original designation is disclosed.

8 6.2 Meet and Confer. The parties must make every attempt to resolve any
9 dispute regarding confidential designations without court involvement. Any
10 motion regarding confidential designations or for a protective order must include a
11 certification, in the motion or in a declaration or affidavit, that the movant has
12 engaged in a good faith meet and confer conference with other affected parties in
13 an effort to resolve the dispute without court action. The certification must list the
14 date, manner, and participants to the conference. A good faith effort to confer
15 requires a face-to-face meeting or a telephone conference.

16 6.3 Judicial Intervention. If the parties cannot resolve a challenge without
17 court intervention, the designating party may file and serve a motion to retain
18 confidentiality under Local Civil Rule 7 within 14 days of the parties conferring.
19 The burden of persuasion in any such motion shall be on the designating party.
20 Frivolous challenges, and those made for an improper purpose (*e.g.*, to harass or
21 impose unnecessary expenses and burdens on other parties) may expose the
22 challenging party to sanctions. All parties shall continue to maintain the material
23 in question as confidential until the court rules on the challenge.

24 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED
25 IN OTHER LITIGATION

26 If a party is served with a subpoena or a court order issued in other
27 litigation that compels disclosure of any information or items designated in this
28 action as "CONFIDENTIAL," that party must:

**ORDER GRANTING THE PARTIES' JOINT MOTION FOR ENTRY
OF PROTECTIVE ORDER ~ 8**

1 (a) promptly notify the designating party in writing and include a copy of
2 the subpoena or court order;

3 (b) promptly notify in writing the party who caused the subpoena or order
4 to issue in the other litigation that some or all of the material covered by
5 the subpoena or order is subject to this Order. Such notification shall
6 include a copy of this Order; and

7 (c) cooperate with respect to all reasonable procedures sought to be
8 pursued by the designating party whose confidential material may be
9 affected.

10 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

11 If a receiving party learns that, by inadvertence or otherwise, it has
12 disclosed confidential material to any person or in any circumstance not
13 authorized under this Order, the receiving party must immediately (a) notify in
14 writing the designating party of the unauthorized disclosures, (b) use its best
15 efforts to retrieve all unauthorized copies of the protected material, (c) inform the
16 person or persons to whom unauthorized disclosures were made of all the terms of
17 this Order, and (d) request that such person or persons execute the
18 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit
19 A.

20 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
21 PROTECTED MATERIAL

22 When a producing party gives notice to receiving parties that certain
23 inadvertently produced material is subject to a claim of privilege or other
24 protection, the obligations of the receiving parties are those set forth in Federal
25 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
26 whatever procedure may be established in an e-discovery order or agreement that
27 provides for production without prior privilege review. The parties agree to the
28 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

10. NON-TERMINATION AND RETURN OF DOCUMENTS

Within 60 days after the termination of this action, including all appeals, each receiving party must return all confidential material to the producing party, including all copies, extracts and summaries thereof. Alternatively, the parties may agree upon appropriate methods of destruction.

Notwithstanding this provision, counsel is entitled to retain one archival copy of all documents filed with the court, trial, deposition, and hearing transcripts, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain confidential material.

The confidentiality obligations imposed by this Order shall remain in effect until a designating party agrees otherwise in writing or a court orders otherwise.

Pursuant to Fed. R. Evid. 502(d), the production of any documents in this proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute a waiver by the producing party of any privilege applicable to those documents, including the attorney-client privilege, attorney work-product protection, or any other privilege or protection recognized by law.

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order and forward copies to counsel.

DATED this 8th day of February 2021.



A handwritten signature in blue ink that reads "Stanley A. Bastian".

Stanley A. Bastian
United States District Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare
under penalty of perjury that I have read in its entirety and understand the
Protective Order that was issued by the United States District Court for the
Eastern District of Washington in the case of *Elshieky v. United States*, 2:20-CV-
00064 (E.D. Wash.). I agree to comply with and to be bound by all the terms of
this Protective Order and I understand and acknowledge that failure to so comply
could expose me to sanctions and punishment in the nature of contempt. I
solemnly promise that I will not disclose in any manner any information or item
that is subject to this Protective Order to any person or entity except in strict
compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District
Court for the Eastern District of Washington for the purpose of enforcing the
terms of this Protective Order, even if such enforcement proceedings occur after
termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____